PRABAH SINNATHAMBY A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
KANG HWEE GEE JCA
AZHAR MA'AH JCA
[CRIMINAL APPEAL NO: B-05-5-2006]
29 APRIL 2009 C

***EVIDENCE**: Witness - Self-incrimination - Whether judge duty-bound to compel witness to answer self-incriminating question if relevant to matter in issue - Whether judge obliged to explain to witness protection afforded to his answer under s. 132(2) Evidence Act 1950*

***EVIDENCE:** Identification evidence - Accused, of - Dock identification - Whether trial judge correct to accept dock identification of accused though trial took place 18 months after arrest - Whether judge satisfied victim had sufficient opportunity to recognise accused in court* D

The appellant ('accused') was sentenced to life imprisonment and ordered to be given six strokes of the rotan after he was found guilty of kidnapping a hotel owner together with four others still at large. The victim was kidnapped at gun-point, handcuffed and taken in a car to a jungle where he was detained for two days before being released after his ransom was paid. The victim told the trial court that he had the opportunity on at least four occasions during the episode to recognise the accused as one of the kidnappers. While the trial judge rejected the identification of the accused at the identification parade organised by the police as being unreliable, he accepted the dock identification of the accused at the trial. During the trial, a defence witness refused to answer the defence counsel's question on whether he was involved in the kidnapping for fear it would incriminate him. Counsel then applied to the court under s. 132 of the Evidence Act 1950 ('the Act') to order the witness to answer the question and to explain to him that he would not be arrested or prosecuted for his answer. The prosecution had objected on the ground that affording such protection to the witness was against public policy. The trial judge disallowed counsel's application. This became one of the accused's two grounds of appeal against his conviction to the Court of Appeal. The other was that the trial judge was wrong to have accepted the dock identification of the accused as the trial took place some 18 months after his arrest. E F G H I

A **Held (dismissing appeal; affirming decision of High Court)**
Per Kang Hwee Gee JCA delivering the judgment of the court:

(1) The trial judge was wrong in ruling that the court was not obliged to compel the witness to answer the question which might have incriminated him and to explain the purport of s. 132(2) of the Act to the witness. It was a matter of common sense that if the witness refused to answer a question relevant to a matter in issue, he had to be compelled to do so and s. 132(3) clearly imposed a duty on the judge to explain to the witness the purport of s. 132(2) before compelling him to answer. (paras 20 & 22)

(2) The prosecution's objection on the ground of public policy was misconceived. It was clear that a witness was protected under s. 132(2) of the Act only in respect of the answer he was compelled to give in court. It did not prevent him from being prosecuted for any offence he may have committed. (para 21)

(3) The accused was only entitled to an acquittal if the trial judge's failure to explain the purport of s. 132(2) of the Act had occasioned a failure of justice. The misdirection in this case did not occasion such a failure nor did it prejudice the defence. The witness did not appear in court to continue with or conclude his testimony. The defence closed its case immediately after the judge's ruling thereby shutting out the prosecution's right to test the witness' credibility by cross-examination. It was the duty of the defence to bring the witness to court to be examined and cross-examined and nothing could flow from a witness who failed to complete his evidence before the court. The ruling was therefore a *non sequitur*. (paras 24 & 26)

(4) It was permissible for the court to rely on dock identification alone if it was satisfied that the essential factors required to enable the identifier to identify the accused were present and resorted to. Although the trial was conducted some 18 months after the accused's arrest, the trial judge was satisfied that the victim could positively identify the accused given the number of opportunities he had to see and recognise the accused throughout the kidnapping episode. (paras 29 & 30)

(5) It was not improbable that a person put in similar circumstances as the victim would have been able to recognise his captor some 18 months after the fact. The trial judge had correctly appreciated the evidence in accepting the victim's dock identification of the accused as one of his kidnappers. (para 36)

Case(s) referred to:
Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Kiew Foo Mui & Ors v. PP [1996] 1 CLJ 14 SC ***(refd)***
Lai Kim Hon & Ors v. PP [1980] 1 LNS 197 FC ***(refd)***
Lee Ah Seng & Anor v. PP [2007] 5 CLJ 1 FC ***(refd)***
Mraz v. R [1955] 93 CLR 439 ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
Rex v. GA Philips [1936] 1 LNS 76 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Evidence Act 1950, s. 132(1), (2), (3)
Kidnapping Act 1961, s. 3

Criminal Appeal Act 1912 [NSW], s. 6

For the appellant - Gurbachan Singh; M/s Bachan & Kartar
For the respondent - Idham Abd Ghani; DPP

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-22-2001]

Reported by Ashok Kumar

JUDGMENT

Kang Hwee Gee JCA:

[1] We heard the parties on 28 April 2009 and on 29 April 2009 we dismissed the appeal and affirmed the decision of the High Court. We intimated that we would provide our written judgment at a later date.

[2] The appellant (hereinafter the "accused") was charged with the offence of kidnapping under s. 3 of the Kidnapping Act 1961 jointly and with common intention with four other persons still at large.

[3] The Charge

> Bahawa kamu bersama-sama 4 orang lagi yang masih bebas pada 7 Januari 2001 jam lebih kurang 11.45 malam di hadapan Hotel Grade, Jalan Petaling Utama 6, Petaling Jaya, di dalam Daerah Petaling dalam Negeri Selangor Darul Ehsan bagi melanjutkan niat bersama kamu semua, telah menahan Siow Tian Loy [K/P: No. 550710-10-6325] bagi maksud mendapatkan wang tebusan sebanyak RM2 juta iaitu dengan cara melarikan dan menghalang secara salah Siow Tian Loy dan oleh yang demikian, kamu semua telah melakukan suatu kesalahan di bawah seksyen 3 Akta Penculikan 1961 [Semakan 1989] Akta 365 dan boleh dihukum di bawah seksyen yang sama dibaca bersama Seksyen 34 Kanun Keseksaan.

A

The Narrative

[4] The victim, Siow Tian Loy, was kidnapped by three Indian men as he was loading bags of rice into his car at Jalan Petaling Utama 6 in front of his own hotel known as Hotel Grade at about 11.45pm. on 7 January 2001.

B

[5] He was handcuffed and transported by the kidnappers to a place in a jungle, some distance away from where he was seized. He was detained by them for two days before he was released, after a ransom of RM2 million was paid by his family through his secretary, Ng Siew Khoo (SP4), who was the channel of communication with the victim and his kidnappers.

C

[6] The victim gave evidence that he was able to identify the accused as one of the persons who had kidnapped him as he had the opportunity to see and recognise him on four occasions, which we shall revert to shortly in this judgment.

D

[7] The accused was arrested by the police on 10 June 2001. He had been arrested earlier in Melaka in respect of another case which was investigated by the same investigating officer as in this case.

E

[8] The accused was later identified by the victim at an identification parade held soon after the arrest. He was also identified in the dock at the trial which commenced some 18 months later during the trial. The identification at the parade was rejected as unreliable by the trial judge. The dock identification however was accepted by the judge.

F

[9] The accused was found guilty and convicted. He was sentenced to life imprisonment, a mandatory requirement under s. 3 of the Act and was also ordered to be given six strokes of the rotan.

G

The Appeal

[10] A number of grounds were advanced in the petition. But at the hearing of the appeal, counsel for the accused confined the appeal to only two crucial issues, any one of which he submitted should entitle the accused to an acquittal. They are:

H

(a) The failure of the trial judge to provide a witness called by the defence, the protection under s. 132(2) of the Evidence Act 1950 and to compel the said witness to answer an incriminating question that may expose him to prosecution which the trial judge was under a duty to do pursuant to s. 132(3); and

I

(b) The acceptance by the trial judge of the identification of the accused by the victim as one of the persons who kidnapped him.

Failure To Comply With S. 132(3) Of The Evidence Act 1950 A

[11] In order to appreciate the impact of the failure of the trial judge to explain to the witness the purport of sub-s. 2 it is necessary to retrace what transpired at that stage of the trial when the defence called the witness, Mahandran a/l Muniandy (DW2), to give evidence. B

[12] The notes of evidence at p. 279 of the Appeal Record indicate that counsel for the defence had examined DW2 by asking him the following question:

> Adakah kamu pada 7.1.2001 jam lebih kurang 11.45 di hadapan Hotel Grade, Jalan Petaling Utama 6, Petaling Jaya bersama-sama dengan (4) orang lagi menahan atau menculik seorang China? C
>
> (Translation: Did you on 7.1.2001 at about 11.45 in front of Hotel Grade, Jalan Petaling Utama 6, Petaling Jaya together with 4 other persons detained or kidnapped a Chinese person?) D

[13] The record shows that DW2 replied that he was afraid to answer the question for fear that he may be arrested by the police and punished by the court.

[14] Counsel then sought an order from the court to compel the witness to answer the question and requested the court to assure him of the protection afforded under s. 132(2) on the ground that the court was bound to do so under s. 132(3) of the Evidence Act 1950. E

[15] The learned deputy objected to the order sought. He was of the view that such an order would offend public policy as to afford DW2 such a protection would have the effect of shielding DW2 from being prosecuted for a serious offence which he may have committed along with the accused in this case. F

[16] The hearing was then adjourned to 30 November 2004 for submissions on this issue by both parties. It was further adjourned to the next day, 1 December 2004, for the trial judge to make a ruling on the issue and for the hearing to be continued from there. G

[17] On 1 December 2004 the trial judge disallowed the defence's application to compel DW2 to answer the criminating question and to be provided with immunity as applied for. H

[18] DW2, however, did not turn up to continue with his testimony on this day.

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[19] Now, s. 132 of the Evidence Act 1950 reads as follows:

> **132. Witness not excused from answering on ground that answer will criminate**
>
> (1) A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit, or in any civil or criminal proceeding, upon the ground that the answer to that question will criminate or may tend directly or indirectly to criminate, him, or that it will expose, or tend directly or indirectly to expose, the witness to a penalty or forfeiture of any kind, or that it will establish or tend to establish that he owes a debt or is otherwise subject to a civil suit at the instance of the Government of Malaysia or of any State or of any other person.
>
> (2) No answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by that answer.
>
> (3) Before compelling a witness to answer a question the answer to which will criminate or may tend directly or indirectly to criminate him the court shall explain to the witness the purport of subsection (2).

[20] We are of the view that the trial judge was wrong in ruling that the court was not obliged to compel the witness DW2 to answer the question asked by counsel for the defence which may incriminate him and to explain the purport of s. 132(2) to him. The ruling, it is clear to us, flies in the face of the cold print of s. 132(1). It follows, as a matter of common sense that if DW2 refuses to answer, he must be compelled to and s. 132(3) clearly imposes a duty on the trial judge to explain to him the purport of s. 132(2) before compelling him to do so.

[21] The learned deputy's objection on the ground of public policy is misconceived. Section 132(2) speaks of "answer which a witness shall be compelled by the court to give". It is therefore clear that a witness is protected under this sub-section only in respect of the answer which he is compelled to give in court. It does not prevent him from being prosecuted for any offence which he may have committed.

[22] The approach that a trial judge ought to take when faced with a situation where a witness hesitates to answer a question which may criminate him is to determine firstly whether that question relates to any matter relevant to the matter in issue. A question is relevant to a matter in issue if it is required to prove the existence or non-existence of a fact in issue, and the fact in issue in the instant case would be the act of kidnapping at the place and time specified in the charge. If the question is determined to be relevant to a matter in issue, then it would

be next, necessary for the judge to act under s. 132(3) to compel the witness to answer the question and to explain to the witness the purport of s. 132(2).

[23] Contrary to the view expressed by the trial judge this approach is consistent with what Whitley Ag CJ said in *Rex v. GA Philips* [1936] 1 LNS 76 in the following passage of the judgment:

> It is to be observed that the section uses the word "compelled" and it would appear that a distinction is drawn between those cases in which a witness voluntarily answers a question and those in which he is compelled to answer, giving him a protection in the latter of these cases only. The corresponding section in the Indian Evidence Act which is substantially the same as ours has been considered in a number of cases in India and the view taken has generally been that as the words stand they presuppose an objection by the witness which has been overruled by the judge, and a constraint put upon the witness to answer the particular question.

[24] Be that as it may, in the instant case the accused is only entitled to an acquittal if the failure of the trial judge to explain the purport of s. 132(2) had occasioned a failure of justice. The law on this point is provided under s. 422 of the Criminal Procedure Code which reads as follows:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:
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> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
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> unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

[25] The Federal Court in *Kiew Foo Mui & Ors v. PP* [1996] 1 CLJ 14, found the expression "failure of justice" in s. 422 of the Criminal Procedure Code synonymous with "miscarriage of justice". It approved of what Fullagar J of the High Court of Australia said of an equivalent provision in s. 6 of the New South Wales Criminal Appeal Act 1912 in *Mraz v. R* [1955] 93 CLR 439 at 514 that:

> It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial

> in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

[26] We are of the view the misdirection of the trial judge in this case had not occasioned a failure of justice as such to justify an acquittal. We fail to see how his failure to act under s. 132(3) could in any way prejudice the defence. The witness did not appear in court to continue with or to conclude his testimony. The record shows that the defence proceeded to close its case immediately after the ruling was made thereby shutting out the right of the prosecution to test DW2's credibility by cross-examination. It was the duty of the defence to bring DW2 to court to be examined and cross-examined and nothing can flow from a witness who failed to complete his evidence before the court. The ruling was therefore a *non sequitur*.

The Dock Identification Of The Accused

[27] The identification made by the victim at the parade was rejected by the judge on the ground that the participants in the parade were not of the same age, that no description of the accused was given by the victim before the conduct of the parade, that the accused was bearded, wearing shorts and barefooted whereas the other participants were not bearded, not wearing shorts nor barefooted.

[28] The trial judge was in these circumstances correct to reject the identification made at the parade as unreliable under the *Turnbull* test. The only issue here is whether the judge was right to accept the dock identification of the accused by the victim.

[29] The authorities are clear. It is permissible for the court to rely on dock identification alone if it finds the identification parade defective and had rejected it. (See *Ong Poh Cheng v. PP* [1998] 4 CLJ 1.) A dock identification may be accepted if the court is satisfied that the essential factors required to enable the identifier to identify the accused are present and resorted to. This was how the Federal Court in *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597 at 602 (per Chong Siew Fai CJ Sabah & Sarawak) puts it:

> Much depends on the precise circumstances and the stance of the defence. How long is the 'long lapse'? What are the circumstances in which a witness has seen the accused, eg, the distance between him and the accused, the weather condition, any lighting particularly if at

night, and if so, quality of the lighting, the length of time the witness sees or observes the accused, any conversation carried on between them, whether the witness had known or seen the accused prior to the incident, and so forth. Facts such as those mentioned above are lacking, but they are essential for the purpose of arriving at a more definite answer to the above question referred.

[30] We note that the trial was conducted some 18 months after the arrest of the accused. Nevertheless, the trial judge was satisfied that the victim could positively identify the accused given the number of opportunities that the victim was able to see and recognise the accused throughout the episode.

[31] Before us the learned Deputy Public Prosecutor submitted a detailed account of four opportunities which the victim had in recognising the accused.

[32] The first opportunity was on the night of 7 January 2001 when the victim was seized at the road in front of the Hotel Grade an area well lighted by street lights. The evidence disclosed that the victim was loading two bags of rice into his car at Jalan Petaling Utama 6 when he heard someone shouting "police". He turned around and faced three Indian males: one, a fat person with a moustache holding a gun whom he identified as the accused; the other two were of thinner frame one of whom was holding a handcuff which was subsequently used to restrain the victim. The victim was pushed into a Proton car and he was seated between the accused and another person. It was only then that the victim's head was covered with a piece of cloth. (See pp. 26, 58 and 74 of NE.)

[33] The second opportunity was on the same night at the place where he was detained when he tried to escape. The record shows that upon realising that only one person was guarding him, the victim managed to remove the cloth covering his head. He then used both his handcuffed hands to hit the person guarding him in the course of which the handcuff became undone. By then the other person had returned. He was able to hold each one of them by the neck in each of his arm. The victim testified that the person whose neck he held in his right arm was the accused. He could see the accused as there was moonlight. The victim failed to escape and was again handcuffed. A roll of plastic tape was then used to tape around his head to cover his eyes. A piece of cloth from a bed sheet was then used to cover his head.

[34] The third opportunity was on the morning of 8 January 2001 in broad daylight after being again restrained. He was able to see through a gap in the tape and the small hole he had managed to make by biting off a small piece of the cloth. He saw two persons guarding him, one of whom he could recognise as the accused.

A **[35]** The fourth opportunity was on the next day of 9 January 2001 at daybreak at the same place. Again the victim was able to push aside the tape covering his eyes and see through the small hole on the cloth. He was able to see the same two persons guarding him, one of whom he could identify as the accused.

B **[36]** It is in our view, not improbable that a person put in similar circumstances as the victim would be able to see and to recognise his captor some 18 months after the fact. We are therefore satisfied that the trial judge had correctly appreciated the evidence in accepting the victim's dock identification of the accused as one of the persons who
C kidnapped him.

[37] One may be reminded of what Azmel Maamor FCJ said of the well established "guiding principle" in the recent Federal Court case of *Lee Ah Seng & Anor v. PP* [2007] 5 CLJ 1 para. 64 that "the appellate
D court should be very slow in disturbing the finding of the trial judge." His Lordship recalled what Abdul Hamid FJ (as he then was) said earlier in *Lai Kim Hon & Ors v. PP* [1980] 1 LNS 197; [1981] 1 MLJ 84 at p. 93:

> Viewed as a whole it seems clear that the finding of fact made by the
E trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is
F again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.
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[38] We could find no reason to disturb the findings of the trial judge.

[39] For the foregoing reasons we dismissed the appeal and affirmed the decision of the High Court.

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